

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
Americatel Corporation and Telecom Italia of)	
North America, Inc.)	
)	File Nos. ITC-MOD-20020502-00212 and
Application to Modify Regulatory Classification)	ITC-MOD-20020502-00213
from Dominant to Non-Dominant on the U.S.-)	
Argentina Route)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 2003

Released: December 30, 2003

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we deny the request of Americatel Corporation (“Americatel”) and Telecom Italia of North America, Inc. (“TINA”) (together “Applicants”) to modify their regulatory classification from dominant to non-dominant on the U.S.-Argentina route.¹ We also deny the Applicants’ request that Telecom Argentina S.A. (“Telecom Argentina”) be removed from the Commission’s *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*.²

II. BACKGROUND

2. In the *Foreign Participation Order*,³ the Commission established a framework to encourage

¹ Application of Americatel Corporation and Telecom Italia of North America, Inc., to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Argentina Route, Application File Nos. ITC-MOD-20020502-00212 (Americatel Corporation) and ITC-MOD-20020502-00213 (Telecom Italia of North America, Inc.) (filed May 2, 2002) (“Application”).

² *International Bureau Revises and Reissues the Commission’s List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, DA 03-1812 (rel. June 5, 2003) (Int’l Bur. 2003) (“*Foreign Carriers List*”). The *Foreign Carriers List* is available at <http://www.fcc.gov/ib> as “Resources, Foreign Carriers Presumed to Possess Market Power.” The *Foreign Carriers List* was originally released as *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, DA 99-809 (rel. May 6, 1999; erratum rel. June 18, 1999) (Int’l Bur. 1999).

³ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket 97-142, 95-22, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 (1997) (“*Foreign*

(continued....)

competitive entry by foreign carriers into the U.S. telecommunications market, in fulfillment of the United States' commitments under the WTO Basic Telecom Agreement.⁴ The Commission expressed concern, however, that a foreign carrier with market power⁵ in an input market⁶ on the foreign end of a U.S. international route has the ability to "leverage" that market power into the U.S. market for international telecommunications services, *i.e.*, use market power in its home market to affect adversely competition in the U.S. market, thereby harming U.S. consumers.⁷ Firms with market power in an "upstream" input market can engage in discrimination in a "downstream" market by favoring one downstream entity at the expense of its competitors.⁸ Where the upstream firm possesses market power, downstream competitors have few, if any, alternatives for the inputs that the upstream firm provides.⁹ In order to complete a U.S. international call, a U.S. carrier must obtain as inputs various call termination services from foreign carriers in the destination country of the U.S. call, including international transport services, inter-city services within the destination country, and terminating access services within the local exchange of the called party.¹⁰ A foreign carrier with market power in these input markets could favor one U.S. international carrier at the expense of its rivals by denying rivals access to these crucial termination services, or by providing the services at non-competitive prices or inferior service quality levels.¹¹ The ultimate effect of such discrimination would be to affect adversely competition in the U.S. international services market and harm U.S. consumers.¹²

3. The Commission found that an ownership affiliation between a U.S. carrier and a foreign carrier creates a heightened ability and incentive to engage in anti-competitive behavior.¹³ Accordingly, the Commission adopted certain safeguards to ensure that U.S. affiliates of foreign carriers with market power on the foreign end of a route do not harm competition in the United States. Under the Commission's rules, a U.S. carrier that is affiliated with a foreign carrier that has market power on the foreign end of a route is presumptively classified as dominant for the provision of international telecommunications services on that route (with limited exceptions).¹⁴ U.S. international carriers

(...continued from previous page)

Participation Order"); Order on Reconsideration, FCC 00-339, 15 FCC Rcd 18158 (2000) ("*Foreign Participation Reconsideration Order*").

⁴ The results of the World Trade Organization's ("WTO") basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services ("GATS") by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement."

⁵ The Commission has defined market power as "a carrier's ability to raise price by restricting its output of services." *Foreign Participation Order*, 12 FCC Rcd at 23951-52, para. 144.

⁶ In producing goods or services, firms must obtain labor, capital, raw materials, and intermediate goods and services as "inputs" to the production process. The markets in which these inputs are obtained are termed "input markets." *Id.* at 23952, para. 145.

⁷ *Id.* at 23952, para. 145, and 23958, para. 157.

⁸ *Id.* at 23952, para. 145. Markets in which a firm buys inputs to its production process are termed "upstream" relative to the market in which the firm sells its product, and a market in which a firm sells its product is termed "downstream" relative to the input markets.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 23952, para. 145, and 23958, para. 157.

¹² *Id.* at 23958, para. 157.

¹³ *Id.* at 23954, para. 147 and 23992, para. 223.

¹⁴ 47 C.F.R. § 63.10(a)(3) - (a)(4) (2003).

classified as dominant on a particular route are subject to certain requirements to safeguard competition.¹⁵ These requirements include separation requirements,¹⁶ reporting requirements,¹⁷ and certain conditions related to benchmark settlement rates.¹⁸ Reclassification as non-dominant relieves a U.S. carrier of these requirements.

4. The Commission also found that a foreign carrier with market power can act anti-competitively with respect to the U.S. market even in the absence of a U.S. affiliate (e.g., through a contractual agreement with a U.S. carrier).¹⁹ Accordingly, the Commission has established several competitive safeguards with which all U.S. international carriers must comply when providing international telecommunications services that terminate on the network of a foreign carrier with market power on the foreign end of a U.S. international route. These safeguards include the “No Special Concessions” rule,²⁰ contract filing requirements,²¹ the international settlements policy (“ISP”),²² and

¹⁵ 47 C.F.R. § 63.10(c), (e) (2003). *See also Foreign Participation Order*, 12 FCC Rcd at 23987-24022, paras. 215-92.

¹⁶ The U.S.-authorized carrier must provide service as an entity that is separate from its foreign affiliate. 47 C.F.R. § 63.10(c)(1) (2003). The U.S. carrier must have separate books of account and not jointly own transmission or switching facilities with its affiliate. 47 C.F.R. § 63.10(c)(1)(i)-(ii) (2003).

¹⁷ The U.S.-authorized carrier must file quarterly traffic and revenue reports as well as quarterly provisioning and maintenance reports. 47 C.F.R. § 63.10(c)(2)-(3) (2003). The U.S.-authorized carrier also must file quarterly circuit status reports. 47 C.F.R. § 63.10(c)(4) (2003).

¹⁸ The U.S.-authorized carrier may not provide facilities-based switched services on a route on which it is classified as dominant, unless its foreign affiliate on that route charges U.S. international carriers termination rates at or below benchmark settlement rates. 47 C.F.R. § 63.10(e) (2003). *See also International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC 19806 (1997) (“*Benchmarks Order*”); Report and Order on Reconsideration and Order Lifting Stay, FCC 99-124, 14 FCC Rcd 9256 (1999) (“*Benchmarks Reconsideration Order*”), *aff’d sub nom. Cable & Wireless P.L.C. v. F.C.C.*, 166 F.3d 1224 (D.C. Cir. 1999).

¹⁹ *See Foreign Participation Order*, 12 FCC Rcd at 23954, para. 147; 23958, para. 157.

²⁰ Under the Commission’s “No Special Concessions” rule, a U.S.-authorized international carrier is prohibited from accepting special concessions from a foreign carrier with respect to a route on the foreign end of which the foreign carrier possesses sufficient market power to affect competition adversely in the U.S. market. 47 C.F.R. § 63.14(a) (2003). For U.S. international carriers, special concessions are defined as exclusive arrangements involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangements are not offered to similarly situated U.S.-licensed carriers. 47 C.F.R. § 63.14(b) (2003). Such arrangements include operating agreements for the provision of basic services; distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operating characteristics such as provisioning and maintenance times; and any information, prior to public disclosure, about a foreign carrier’s basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country’s domestic network by U.S. carriers or their U.S. customers. 47 C.F.R. § 63.14(b)(1)-(3) (2003). If the international route is exempt from the international settlements policy, 47 C.F.R. § 43.51(e)(3) (2003), the “No Special Concessions” rule does not apply to the rates, terms, and conditions in an agreement between a U.S.-authorized carrier and a foreign carrier that govern the settlement of international traffic, including the method for allocating return traffic. 47 C.F.R. § 63.14(c) (2003).

²¹ A U.S.-authorized carrier that enters into a contract regarding the exchange of services, routing of traffic, or accounting rates with a foreign carrier with respect to a route on the foreign end of which the foreign carrier possesses market power is required to file a copy of the contract within 30 days. 47 C.F.R. § 43.51(a)(1), (b)(2), and Note 3 to § 43.51 (2003).

²² Under the ISP, if a U.S.-authorized carrier files an operating agreement with a foreign carrier regarding the exchange of switched traffic with respect to a non-exempt route on the foreign end of which the foreign carrier possesses market power, the operating agreement must comport with certain requirements; otherwise, the U.S.

(continued....)

requirements regarding the provision of switched services over private lines.²³ Similarly, the Commission also has established competitive safeguards that apply to U.S. cable landing licensees when connecting with the network of a foreign carrier with market power on the foreign end of a U.S. international route.²⁴ The Commission's *Foreign Carriers List* identifies those foreign carriers with which exchange of traffic is subject to the requirements described above.²⁵ Removal of a foreign carrier from the *Foreign Carriers List* relieves U.S.-authorized carriers with which the foreign carrier corresponds of these requirements.

III. THE APPLICATIONS

5. Americatel and TINA are authorized to provide U.S. international telecommunications services pursuant to Section 214 of the Communications Act of 1934, as amended.²⁶ Each is affiliated,

(...continued from previous page)

carrier must file a modification request with the International Bureau. 47 C.F.R. § 43.51(e) (2003). The operating agreement is required to have terms and conditions pertaining to the exchange of services, routing of traffic, accounting rates, and the proportionate share of return traffic that are identical to that of other carriers providing the same or similar service. 47 C.F.R. § 43.51(e)(1)-(2) (2003). The restriction of the ISP to operating agreements between U.S. carriers and foreign carriers that possess market power is described in 47 C.F.R. § 43.51(e)(1) (2003), with reference to 47 C.F.R. § 43.51(a)(1), (b)(2), and Note 3 to § 43.51 (2003). The exempt routes are described in the Note to § 43.51(e)(3) (2003). See also Resources, "Routes Exempt from the ISP," available at www.fcc.gov/ib.

²³ A U.S.-authorized carrier may provide switched basic services over its authorized private lines if the foreign carrier with which traffic is exchanged is in a destination country that appears on the Commission's list of authorized destinations. 47 C.F.R. § 63.22(e)(1) (2003); 47 C.F.R. § 63.23(d)(1) (2003); and 47 C.F.R. § 63.16(a)(2003). See Resources, "ISR-Approved Routes" at www.fcc.gov/ib ("International Simple Resale" or "ISR"). Also, a U.S. carrier may provide switched basic services over its authorized private lines if the foreign carrier with which traffic is exchanged lacks market power on the foreign end of the route. 47 C.F.R. §§ 63.22(e)(2)-(3), 63.23(d)(2)-(3) (2003). Because Argentina appears on the list of ISR-approved routes, U.S. carriers currently may provide switched basic services over authorized private lines to any carrier in Argentina. Therefore, a finding by the International Bureau that Telecom Argentina lacks market power on the foreign-end of the U.S.-Argentina route would not confer any privileges upon Telecom Argentina or U.S. carriers regarding the exchange of switched basic services over authorized private lines in correspondence with any carrier on the U.S.-Argentina route that they do not already possess.

²⁴ U.S. cable landing licensees are prohibited from accepting special concessions from any foreign carrier, including any entity that owns or controls a foreign cable landing station, with respect to a route on the foreign end of which the foreign carrier possesses sufficient market power to affect competition adversely in the U.S. market. 47 C.F.R. § 1.767(g)(5)(i) (2003) and Note to Paragraph (g)(5). In the case of cable landing licensees, special concessions are defined as exclusive arrangements involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary to land, connect, or operate submarine cables, where the arrangement is not offered to similarly situated U.S. submarine cable owners. 47 C.F.R. § 1.767 (g)(5)(ii) (2003).

²⁵ See *Foreign Carriers List*. See also 47 C.F.R. § 1.767(g)(5) (2003) and Note to Paragraph (g)(5); 47 C.F.R. § 43.51(b)(2) (2003) and Note 3 to § 43.51; 47 C.F.R. § 63.14(a) (2003) and Note to Paragraph (a); 47 C.F.R. § 63.22(e)(2)-(3) (2003); and 47 C.F.R. § 63.23(d)(2)-(3) (2003). In the *ISP Reform Order*, the Commission modified its rules to remove its requirement that agreements between U.S. telecommunications carriers and foreign carriers that lack market power in foreign telecommunications markets conform to the ISP and stated that it would issue a list of foreign carriers that do not qualify for the presumption that they lack market power on the foreign end of U.S. international routes. See *1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements, Regulation of International Accounting Rates, Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket No. 98 -148, Report and Order and Order on Reconsideration, FCC 99-73, 14 FCC Rcd 7963, 7971, para. 20, 7978-79, para. 43, 7980-81, paras. 47-49, and 7988, para. 65 (1999) ("*ISP Reform Order*"). Subsequently, the Commission issued the *Foreign Carriers List*.

²⁶ 47 U.S.C. § 214. See Application at 1, n. 1.

within the meaning of Section 63.09 of the Commission's rules,²⁷ with Telecom Argentina, an incumbent local exchange carrier in Argentina, and is classified as dominant on the U.S.-Argentina route pursuant to Section 63.10 (a) of the rules.²⁸ As an incumbent local exchange carrier in Argentina, Telecom Argentina is included in the *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*.²⁹

6. On May 2, 2002, the Applicants filed a request³⁰ to modify their regulatory classification from dominant to non-dominant on the U.S.-Argentina route and to have Telecom Argentina removed from the Commission's *Foreign Carriers List*. The Applicants explain that in 1990 the Argentina government privatized and divided Empresa Nacional de Telecomunicaciones ("Entel"), the state-owned telecommunications monopoly into two regional companies: Telecom Argentina, which became the sole provider of local and domestic long-distance service in the northern region of Argentina, and Telefónica de Argentina S.A. ("Telefónica de Argentina"), which became the sole provider of local and domestic long-distance service in the southern region of the country.³¹ According to the Applicants, both Telecom Argentina and Telefónica de Argentina received a half share of the Buenos Aires city market.³² Telintar, a separate company jointly owned by Telecom Argentina and Telefónica de Argentina, provided Argentina's international telecommunications services.³³ In 1999, Telecom Argentina and Telefónica de Argentina divided and assimilated the operations of Telintar.³⁴ The Applicants also state that, in 1999, the exclusive licenses of Telecom Argentina and Telefónica de Argentina terminated when the government of Argentina introduced limited competition in the local, long-distance, and international

²⁷ 47 C.F.R. § 63.09 (e) and Note 2 to § 63.09 (2003). Telecom Italia, S.p.A. controls Americatel and TINA (through majority ownership of intervening subsidiaries) and owns more than 25 percent of Telecom Argentina, thus causing Americatel and TINA to be affiliates of Telecom Argentina. For a description of Telecom Italia S.p.A.'s control of Americatel, see Joint Application of Empresa Nacional de Telecomunicaciones S.A. and STET International Netherlands N.V. for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Transfer Control of Americatel Corporation, an authorized international carrier, from ENTEL-Chile to STET, File No. ITC-T/C-20010119-00047 (filed Jan. 19, 2001) ("Americatel Transfer of Control Application"), Exhibit A. See also *Pro Forma* Transfer of Control of Americatel Corporation, File No. ITC-T/C-20030606-0348, (filed Jun. 6, 2003) at 6-7. For a description of Telecom Italia S.p.A.'s control of TINA, see Application of Telecom Italia of North America, Inc. for Global Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Operate as an International Facilities-based Carrier and Resale Carrier Between the United States and Various International Points, Except San Marino and the Federal Republic of Yugoslavia (Serbia and Montenegro), File No. ITC-214-2000523-00313 (filed May 23, 2000) ("TINA Section 214 Application") at 5. See also *Pro Forma* Transfer of Control of Telecom Italia of North America, Inc., File No. ITC-T/C-20030609-00350 (filed June 9, 2003) at 5-6. For a description of Telecom Italia S.p.A.'s ownership interests in Telecom Argentina, see Americatel and TINA Reply to the Opposition of AT&T Corp. (filed Jul. 12, 2002) ("Applicants' Reply") at 7. See also Americatel Transfer of Control Application at 2 and TINA Section 214 Application at 2 (Americatel and TINA acknowledging affiliation with Telecom Argentina within the meaning of Section 63.09(e) of the rules).

²⁸ 47 C.F.R. § 63.10(a) (2003). The Commission conditioned grants of Americatel's Transfer of Control Application and TINA's Section 214 Application on the commitment of Americatel and TINA respectively to accept dominant carrier classification on the U.S.-Argentina route without prejudice to the right to petition for reclassification at a later date. See *International Authorizations Granted*, Public Notice, DA 01-476, rel. Feb. 22, 2001 (granting the Americatel Transfer of Control Application) and *International Authorizations Granted*, Public Notice, DA 00-1408, rel. June 23, 2000 (granting the TINA Section 214 Application).

²⁹ *Foreign Carriers List* at 3.

³⁰ See Application.

³¹ *Id.* at 3-4.

³² *Id.* at 3. Applicants' Reply at 5, n. 8.

³³ Application at 3-4.

³⁴ *Id.* at 4.

telecommunications markets and that, in November 2000, the government of Argentina opened all areas of its basic telecommunications market to full competition with no limit on the number of competitors (foreign or domestic) that could enter the market.³⁵

7. The Applicants argue that Telecom Argentina lacks sufficient market power on the foreign end of the U.S.-Argentina route to affect competition adversely in the U.S. market and that, consequently, the Applicants should be re-classified as non-dominant on the U.S.-Argentina route and Telecom Argentina should be removed from the Commission's *Foreign Carriers List*.³⁶ In support of their argument, the Applicants claim that Telecom Argentina has less than 50 percent market share of the local access and international transport markets on the foreign end of the route and, therefore, under the Commission's rules, presumptively lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market.³⁷ The Applicants also argue that under a full economic analysis of market power, in which market share is just one factor, Telecom Argentina does not have market power on the foreign end of the route.³⁸

8. The Bureau placed the Application on public notice.³⁹ AT&T Corp. (AT&T) filed an opposition to the Application.⁴⁰ AT&T argues that Telecom Argentina's monopoly control of its franchise region remains intact and, therefore, the Application should be denied.⁴¹ According to AT&T, the Applicants have provided no evidence that Telecom Argentina has less than 50 percent market share in the relevant international transport and local access markets on the foreign end of the U.S.-Argentina route.⁴² According to AT&T, the Applicants' assertion that Telecom Argentina has less than 50 percent market share in the local access market is based on an erroneous assumption that the relevant geographic market for measuring Telecom Argentina's local access market share is the entire country of Argentina rather than Telecom Argentina's local franchise area.⁴³ AT&T also asserts that the Applicants have not shown any other basis for finding that Telecom Argentina lacks market power on the foreign end of the U.S.-Argentina route.⁴⁴

9. The Applicants filed a reply to the opposition of AT&T,⁴⁵ and both parties made *ex parte*

³⁵ *Id.* at 4.

³⁶ *Id.* at 1-2 and 10-11.

³⁷ *Id.* at 2-3 and 5-6. See 47 C.F.R. § 63.10(a)(3) (2003) and 47 C.F.R. § 43.51, Note 3 to § 43.51 (2003). See also *Foreign Participation Order*, 12 FCC Rcd at 23959-62, paras. 161-63 and 23996, paras. 232-33.

³⁸ Application at 3 and 6-10. See also *Foreign Participation Order*, 12 FCC Rcd at 23959-62, paras. 161-63, and 23996, para. 233.

³⁹ *Application of Americatel Corporation and Telecom Italia of North America, Inc., to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Argentina Route*, Public Notice, DA-02-1165 (rel. May 16, 2002) (Int'l Bur. 2002).

⁴⁰ Opposition of AT&T Corp. to Application, File Nos. ITC-MOD-20020502-00212, ITC-MOD-20020502-00213 (filed June 17, 2002) ("AT&T Opposition").

⁴¹ *Id.* at 1-2, 4 -5, and 7.

⁴² *Id.* at 1-5.

⁴³ *Id.* at 3-5. See also *Foreign Participation Order*, 12 FCC Rcd at 23952, para. 145.

⁴⁴ AT&T Opposition at 5-7.

⁴⁵ See Applicants' Reply. The Applicants filed for and were granted an extension of time to reply to AT&T's Opposition. *Americatel Corporation and Telecom Italia of North America, Inc., Application to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.- Argentina Route*, Order, File No. ITC – MOD – 20020502 – 00212 and File No. ITC – MOD – 20020502 – 00213, DA 02-1593 (IB/PD 2002).

presentations.⁴⁶ In their reply, the Applicants argue that they have correctly identified the relevant geographic market for local access services as the entire country of Argentina.⁴⁷ The Applicants further argue that they have provided information sufficient to show that Telecom Argentina controls less than 50 percent of the relevant markets in Argentina.⁴⁸ The Applicants also argue that they and their indirect parent, Telecom Italia S.p.A., have little or no incentive or ability to control Telecom Argentina.⁴⁹ Finally, the Applicants argue that Telecom Argentina lacks sufficient market power to be able to affect competition adversely on the U.S.-Argentina route because of pro-competitive conditions in Argentina's telecommunications sector.⁵⁰

IV. DISCUSSION

10. We find that the Applicants have not demonstrated that they should be reclassified as non-dominant carriers on the U.S.-Argentina route or that Telecom Argentina should be removed from the *Foreign Carriers List*. As discussed below, the Applicants fail to show that Telecom Argentina has less than 50 percent market share in the local access market on the foreign end of the U.S.-Argentina route or that Telecom Argentina nevertheless lacks sufficient market power in the local access market to affect competition adversely in the U.S. market for telecommunications services to Argentina. Such a demonstration is required by the Commission's rules for removal of a foreign carrier from the *Foreign Carriers List* and reclassification of its U.S. affiliates as non-dominant on the route for which the foreign carrier was listed.⁵¹ Because the Applicants' failure to make such a demonstration is by itself fatal to their petition, we need not evaluate whether Telecom Argentina lacks market power in any of the other markets necessary for the termination of U.S. international services (e.g., the international transport market).

11. Section 63.13 of the Commission's rules⁵² requires a U.S. carrier that seeks to modify its regulatory status from dominant to non-dominant on a particular route to provide information to demonstrate that it qualifies for non-dominant classification pursuant to Section 63.10 of the Commission's Rules.⁵³ Under 63.10 (a)(3), a carrier seeking such relief bears the burden of submitting information to the Commission sufficient to demonstrate that its foreign affiliate lacks sufficient market power on the foreign end of the route to affect competition adversely in the market for U.S. international telecommunications services.⁵⁴ The relevant input markets on the foreign end of a U.S. international route are markets that involve services or facilities necessary for the termination of U.S. international services and include: (1) international transport facilities or services; (2) inter-city facilities or services; and (3) local access facilities or services.⁵⁵ For purposes of identifying the relevant geographic market for

⁴⁶ Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC (dated Aug. 2, 2002); Letter from Troy F. Tanner, Counsel for Telecom Italia of North America and Americatel Corp., to Marlene H. Dortch, Secretary, FCC (dated Sept. 5, 2002); and Letter from Douglas W. Schoenberger, Director, International Government Affairs, AT&T, to Marlene Dortch, Secretary, FCC (dated Feb. 14, 2002).

⁴⁷ Applicants' Reply at 1 – 6.

⁴⁸ *Id.* at 4 – 6.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 7 – 9.

⁵¹ 47 C.F.R. § 43.51, Note 3 and § 63.10(a)(3) and (b) (2003). See *Foreign Participation Order*, 12 FCC Rcd at 23952, para. 145, 23959-61, paras. 161-63, and n.317 and n.318. See also *Foreign Participation Order*, 12 FCC Rcd at 23995-6, paras. 231-33.

⁵² 47 C.F.R. § 63.13 (2003).

⁵³ 47 C.F.R. § 63.10 (2003).

⁵⁴ 47 C.F.R. § 63.10(a)(3) (2003).

⁵⁵ 47 C.F.R. § 63.10(a) (2003). See also *Foreign Participation Order*, 12 FCC Rcd at 23952, para. 145.

inter-city and local access facilities, it may be appropriate in some instances to examine a discrete geographic region rather than the national market of a foreign country.⁵⁶ If a U.S. carrier demonstrates that its foreign affiliate lacks 50 percent market share in both the international transport and local access markets on the foreign end of a U.S. route, the Commission's rules provide that the U.S. carrier shall presumptively be classified as non-dominant on that route.⁵⁷ In the absence of such a demonstration, the U.S. carrier may make a showing that its foreign affiliate nevertheless lacks sufficient market power to harm competition in the U.S. market and, therefore, qualifies for classification as non-dominant.⁵⁸ The Commission reviews such a showing under an "appropriate economic analysis of market power," discussed in detail below.⁵⁹ The showing that is required to remove a foreign carrier from the *Foreign Carriers List* is essentially the same as that required for reclassification of a U.S. carrier as non-dominant.⁶⁰

12. As mentioned above, in the *Foreign Participation Order*, the Commission recognized that "for purposes of identifying the relevant geographic market for inter-city services and local access facilities, it may be appropriate in some instances to examine a discrete geographic region rather than the national market of a foreign country."⁶¹ Although the *Foreign Participation Order* does not identify the circumstances in which examination of a discrete geographic region would be appropriate, the International Bureau has held that if a local franchise area⁶² generates a significant share of international traffic,⁶³ then the local franchise area is the relevant geographic market for purposes of determining whether a carrier possesses sufficient market power to affect competition adversely in the United States.⁶⁴

⁵⁶ *Id.* at 23952, para. 145.

⁵⁷ 47 C.F.R. § 63.10(a)(3) (2003). The Commission has found that it is unlikely that a carrier would possess market power in the inter-city input market if it did not have market power in either the international transport or local access input markets. For purposes of demonstrating eligibility for the presumption of non-dominance, therefore, the Commission does not require a showing that the foreign carrier has less than 50 percent market share in the inter-city market. *Foreign Participation Order*, 12 FCC Rcd at 23961, para. 163, n.318, and 23996, para. 232.

⁵⁸ 47 C.F.R. § 63.10(a)(3) (2003). *Foreign Participation Order*, 12 FCC Rcd at 23996, para. 233.

⁵⁹ *Foreign Participation Order*, 12 FCC Rcd at 23996, para. 233, and 23960, para. 162, n.317.

⁶⁰ Section 43.51 of the Commission's rules requires a party seeking to remove a foreign carrier from the Commission's *Foreign Carriers List* to bear the burden of submitting information to the Commission sufficient to demonstrate either that the foreign carrier on the list lacks 50 percent market share in the international transport and local access markets on the foreign end of the route served by the foreign carrier or that the foreign carrier nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. 47 C.F.R. § 43.51, Note 3 to § 43.51 (2003). See also *Foreign Participation Order*, 12 FCC Rcd at 23952, para. 145, 23959-61, paras. 161-63, n.317 and n.318. The latter showing is reviewed under an "appropriate economic analysis of market power," described below. See *Foreign Participation Order*, 12 FCC Rcd at 23960, para. 162 and n.317.

⁶¹ *Foreign Participation Order*, 12 FCC Rcd at 23952, para. 145.

⁶² For the purposes of this Order, the International Bureau defines "local franchise area" to include any geographic area in which a carrier is incumbent, regardless of whether it has exclusive operating authority in that area or whether its operating authority has been extended beyond the area in which it is incumbent.

⁶³ If a large percentage of a foreign country's international traffic originates in a discrete geographic area, it is reasonable to assume that a similarly large percentage of international traffic bound for the foreign country terminates in the same geographic area.

⁶⁴ See 1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements, Bell Canada Petition for Declaratory Ruling, IB Docket No. 98-148, Order, DA 01-1421, 16 FCC Rcd 12465 (2001) ("Bell Canada"). See also *Cable and Wireless, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide Resold and Facilities-Based Switched and Private Line Service between the United States and China*, File No. ITC-214-19980515-00326 (previous File No.

(continued....)

In *Bell Canada*, the International Bureau determined that Bell Canada's local franchise area, which included Canada's two largest provinces and generated more than 60 percent of Canada's international traffic, was the relevant geographic market for purposes of determining whether Bell Canada possessed sufficient market power in Canada to affect competition adversely in the United States.⁶⁵ We found that Bell Canada had the ability to discriminate against and among U.S. carriers seeking to terminate traffic in Canada as a result of its near ubiquitous control of access to end-users in its franchise area.⁶⁶ In *Cable & Wireless – China*, the Telecommunications Division of the International Bureau examined the market power of Cable and Wireless Inc.'s affiliate, Shenda Telephone Company, in a single region that generated a significant portion of China's international traffic, in determining whether Cable and Wireless, Inc. should be subject to dominant carrier safeguards on the U.S.-China route.⁶⁷ The Telecommunications Division found that Shenda's dominant position in a market that generates a significant portion of China's international traffic was one of several factors indicating a substantial risk to competition.⁶⁸

13. The Applicants contend that the relevant local access market is the "entire country of Argentina, not Telecom Argentina's former service area."⁶⁹ According to the Applicants, the identification of the local access market as a discrete geographic region rather than the entire foreign country is an exception applied only under very unique circumstances rather than the general rule.⁷⁰ Contrary to the Applicants' assertions, the decisions in these cases are not exceptional. In all cases subsequent to the adoption of the *Foreign Participation Order* (in which relevant markets are defined) in which the foreign operator's local franchise area has comprised a discrete geographic region rather than the entire foreign country, the International Bureau and the Telecommunications Division have found that the local franchise area is the relevant geographic market for local access services.⁷¹

14. *Bell Canada* and *Cable & Wireless – China* establish the proposition that a foreign carrier operating in a discrete geographic region, *i.e.*, a local franchise area, may possess sufficient market power to affect competition adversely in the United States if a significant amount of U.S. international traffic is terminated in the region. Accordingly, in cases where a significant amount of U.S. international traffic is

(...continued from previous page)

ITC-98-380), Order, Authorization and Certificate, DA 98-2498, 14 FCC Rcd 1863 (1998) ("*Cable and Wireless – China*").

⁶⁵ See *Bell Canada*, 16 FCC Rcd at 12468-69, paras. 8-9.

⁶⁶ *Id.* at 12469, para. 10.

⁶⁷ See *Cable and Wireless – China*, 14 FCC Rcd at 1868-69, paras. 14-18.

⁶⁸ *Id.* at 1869, para. 18.

⁶⁹ Applicants' Reply at 2. More generally, see Applicants' Reply at 2-6 and Application at 5-6. We assume that by employing the phrase "former service area," the Applicants intend to indicate that Telecom Argentina no longer has an exclusive franchise to serve customers in the service area in which Telecom Argentina is, in fact, incumbent.

⁷⁰ Applicants' Reply at 2 – 3.

⁷¹ See *Bell Canada*, 16 FCC Rcd 12468-9, paras. 8-9; *Cable and Wireless – China*, 14 FCC Rcd at 1868-69, paras. 14-18. See also *Cable & Wireless, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Provide Resold and Facilities-based Switched and Private Line Services between the United States and Russia and to be Held Non-Dominant for All Services on This Route*, File No. ITC-97-290, Order, Authorization, and Certificate, 13 FCC Rcd 6671, 6672-3, paras. 6-8 (1998) ("*Cable & Wireless – Russia*"). In *Cable & Wireless – Russia*, the International Bureau examined the market power of Cable & Wireless's affiliates in the Sakhalin Island region and determined that the competitive characteristics in the Sakhalin Island region were sufficiently distinct from the Russian national market to warrant treating the region as a distinct geographic market for purposes of our market power analysis.

terminated in an incumbent's local franchise area, it is appropriate to identify the local franchise area as the relevant geographic market and to examine the foreign carrier's market power within the franchise area rather than throughout the entire country.⁷² In the case before us, Telecom Argentina is the incumbent provider of local and domestic long-distance service in the northern half of Argentina, including half of Buenos Aires, the largest city in Argentina.⁷³ The Applicants state that traffic data for the international long-distance market is not publicly available for Argentina due to its commercially sensitive nature.⁷⁴ In the absence of specific data proving otherwise, it is reasonable to assume that a substantial amount of international traffic on the U.S.-Argentina route is terminated in Telecom Argentina's franchise area because the franchise area comprises approximately half of Argentina. Therefore, we find that it is appropriate in this instance to consider Telecom Argentina's local franchise area as the relevant geographic market for the purpose of determining whether it possesses sufficient market power in the provision of local access services and facilities to affect competition adversely in the United States.

15. Having determined that the relevant geographic market for local access services and facilities is Telecom Argentina's franchise area, we next examine whether Telecom Argentina has market power in that market. The first step in such an analysis is to determine whether Telecom Argentina satisfies the presumption that it lacks market power based on having less than 50 percent market share of the local access market. The Applicants have not provided Telecom Argentina's market share in the local access market, *i.e.*, the share of subscriber lines in Telecom Argentina's local franchise area that is served by Telecom Argentina.⁷⁵ Instead, the Applicants have provided estimated data suggesting that Telecom Argentina has 37.2 percent of subscriber lines in service in the whole of Argentina.⁷⁶ It is not possible to extrapolate reliably from the 37.2 percent figure to find Telecom Argentina's market share in its local franchise area.⁷⁷ The Commission has made it clear that the burden is upon the Applicants to provide information sufficient to make the findings necessary to grant the requested relief.⁷⁸ Therefore, we find that the Applicants have not made the required showing that Telecom Argentina has less than 50 percent market share in the local access market.

16. The next step is to determine whether Telecom Argentina lacks sufficient market power on the foreign end of the U.S.-Argentina route to affect competition adversely in the U.S. market by evaluating information provided by the Applicants under the "appropriate economic analysis of market power" standard established by the Commission in the *Foreign Participation Order*.⁷⁹ We focus on

⁷² See *Foreign Participation Order*, 12 FCC Rcd at 23952, para. 145.

⁷³ See *supra* para. 6.

⁷⁴ Applicants' Reply at 4.

⁷⁵ See *Foreign Participation Order*, 12 FCC Rcd at 23961, para. 163 and n.318.

⁷⁶ Applicants' Reply at 5 and Exhibit B, "Argentina Geographic Distribution of Basic Telephone Lines in Service" (executed Dec. 1999) ("Exhibit B"). This figure represents a correction of the original Application, where the Applicants estimated that Telecom Argentina served approximately 46.6 percent of the total lines in service in Argentina. Application at 5. According to the Applicants, the discrepancy is due to the earlier omission from the line count of local access lines attributable to "telecommunications cooperatives." Applicants' Reply at 5, n.9.

⁷⁷ If we assume that Telecom Argentina's local franchise area includes half of the subscriber lines in Argentina, then the estimate of 37.2 percent for Telecom Argentina's share of total subscriber lines for the nation as a whole translates into a market share of 74.4 percent for its local franchise area. A market share of 74.4 percent exceeds the 50 percent limit below which a carrier is presumed to lack market power.

⁷⁸ 47 C.F.R. § 63.10(a)(3) (2003). A U.S. carrier that seeks to use the under-50 percent market share presumption must file data with the Commission to substantiate that claim for the relevant input markets on the foreign end of the international route. See *Foreign Participation Order*, 12 FCC Rcd at 23961, para. 163, n.318.

⁷⁹ *Foreign Participation Order*, 12 FCC Rcd at 23960-61, para. 162 and n.317, and 23996, para. 233.

whether Telecom Argentina lacks market power in the local access market in its franchise area or lacks the ability to leverage such power into the U.S. market for telecommunications services to Argentina. The Commission's market power analysis entails consideration of several factors,⁸⁰ including: (1) the foreign incumbent's market share; (2) the supply elasticity of the market;⁸¹ (3) the demand elasticity of the market's customers;⁸² and (4) the foreign incumbent's cost structure, size, and resources. In evaluating market power, the Commission has recognized that neither market share, by itself, nor lower costs, sheer size, superior resources, financial strength, and technical capability, by themselves, confer market power.⁸³ Indeed, the Commission has stated that, consistent with well-accepted economic principles, market conditions related to demand and supply elasticities are the more crucial determinants of a firm's market power.⁸⁴ These conditions include the availability of close demand substitutes and ease of entry and expansion.⁸⁵

17. The Applicants argue that Telecom Argentina lacks sufficient market power on the U.S.-Argentina route to adversely affect competition in the U.S. market, based on the following claims: (1) multiple options for international termination are available in Argentina;⁸⁶ (2) there are no significant barriers to entry and expansion due to Argentina's liberal licensing framework;⁸⁷ (3) Argentina is in

⁸⁰ See *Foreign Participation Order*, 12 FCC Rcd 23891, 23960-61, para. 162, n.317. See also *IDC America Inc., Application Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide Non-interconnected International Private Line Service between the United States and Japan*, File No. ITC-96-685, Order, Authorization and Certificate, DA 97-571, 13 FCC Rcd 4085-86, para. 4 (1997). The preceding document cites the *Motion of AT&T Corp. to be Declared Non-dominant for International Service*, Order, FCC 96-211, 11 FCC Rcd 17963, 17977-93, paras. 37-39 (1996) and the *Motion of AT&T Corp. to be Reclassified as a Non-dominant Carrier*, Order, FCC 95-427, 11 FCC Rcd 3271, 3293-94 (1995). See also 1992 Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) 20,569, 20,570 ("1992 DOJ/FTC Merger Guidelines"). See also *AT&T International Reclassification Order*, 11 FCC Rcd at 17977, para. 36. See also *Bell Canada*, 16 FCC Rcd at 12467-68, para. 7.

⁸¹ Supply elasticity is a measure of the aggregate propensity of firms to expand output of a commodity given an increase in the commodity's price. Two factors determine supply elasticity in a market. The first is the supply capacity of existing competitors, and the second is low market entry barriers. See *Motion of AT&T Corp. to be declared Non-dominant for International Service*, Order, FCC 96-311, 11 FCC Rcd 17963, 17980-81, para. 48 (1996) ("*AT&T International Reclassification Order*"). See also *Petition of GTE Hawaiian Telephone Company, Inc. for Reclassification as a Non-dominant IMTS Carrier*, Order, DA 98-1748, 11 FCC Rcd 20354, 20363, para. 19 (1996) ("*GTE Hawaiian Telephone Company*"). In a market characterized by many competitors and low barriers to entry, an attempt by a market incumbent to exercise market power by restricting output or raising prices would fail due to expanded supply by existing competitors or new entrants. In order to demonstrate an absence of market power in the local access market in Telecom Argentina's local franchise area, the Applicants could show that there are multiple competitors that are in a position to supply a substantial portion of the local access market or that there are low barriers to entry in the local access market.

⁸² As used by the Commission in analyzing market power, demand elasticity is a measure of the propensity of an incumbent's customers to switch carriers or otherwise change the amount of service that they purchase from an incumbent in response to given changes in price and quality. See *AT&T International Reclassification Order* at 17979, para. 42. See also *GTE Hawaiian Telephone Company*, 11 FCC Rcd 20365, para. 22. To demonstrate an absence of market power in the local access market, the Applicants could show that Telecom Argentina's customers are willing to switch to other suppliers of local access services or to substitute services, e.g., mobile telephony.

⁸³ *Foreign Participation Order*, 12 FCC Rcd at 23960, para. 162, n.317.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Application at 4-7; and Applicants' Reply at 7-8.

⁸⁷ *Id.* at 4, 7 & 9-10; and Applicants' Reply at 9.

compliance with benchmarks;⁸⁸ and (4) the Applicants and their indirect parent, Telecom Italia, S.p.A., have little or no incentive or ability to control Telecom Argentina. As we explain in detail below, we are not persuaded by the Applicants' arguments and find that the Applicants have failed to make the required economic showing that Telecom Argentina lacks sufficient market power on the U.S.-Argentina route to adversely affect competition in the U.S. market.

18. We do not find persuasive the Applicants' assertion that Telecom Argentina lacks market power due to the availability of multiple options for international termination in Argentina.⁸⁹ According to the Applicants, over 140 licenses have been issued for the provision of telecommunications services in Argentina since the market was fully liberalized in November 2000.⁹⁰ The Applicants imply that many of these licensees are in a position to compete with Telecom Argentina in the termination of international service and that U.S. carriers can rely on these new licensees to bypass Telecom Argentina.⁹¹ One of the essential inputs required for the termination of international traffic is local access service. The Applicants have not shown that the new licensees actually offer local access services in competition with Telecom Argentina or that competition from these licensees is substantial enough to constrain the exercise of market power by Telecom Argentina in the local access market. In fact, as AT&T asserts, the Applicants have presented no evidence that Telecom Argentina has lost any market share for local access services provided within its franchise area.⁹²

19. The Applicants also state that U.S. carriers themselves may enter Argentina's market and become licensed to provide end-to-end services on the U.S.-Argentina route.⁹³ However, while it may be lawful under Argentina's regulatory regime for U.S. carriers to enter the Argentina market for the purpose of providing end-to-end services, the Applicants have not shown that such entry constitutes a realistic competitive alternative for reaching the majority of customers in Telecom Argentina's franchise area, *e.g.*, residential customers and small and medium-sized businesses. The Applicants state that Telefónica de Argentina is a "clear option" for termination of international traffic.⁹⁴ While it may be possible to terminate traffic bound for Telecom Argentina's franchise area with Telefónica de Argentina, the Applicants have not shown how Telefónica de Argentina could reach a significant number of customers in Telecom Argentina's franchise area without using Telecom Argentina's access facilities or undertaking an extensive network build-out program in Telecom Argentina's franchise area that is unlikely to constrain Telecom Argentina's market power in the near-term.

20. The Applicants also argue that mobile termination is an option for U.S. carriers that wish to terminate U.S. international services in Argentina.⁹⁵ Wireless services constitute a realistic competitive alternative to wireline services only if customers consider wireless and wireline services to be close

⁸⁸ Application at 6-9; Applicants' Reply at 8-9; Exhibit C to Applicants' Reply, "Argentina Telephony Licenses" (executed March 2002) ("Exhibit C"); and Exhibit D to Applicants' Reply, "Argentina Fixed Lines versus Mobile Lines" (executed Mar. 2001) ("Exhibit D").

⁸⁹ Application at 4-7; and Applicants' Reply at 7-8.

⁹⁰ Applicants' Reply at 7-8; and Exhibit C. Application at 6-7.

⁹¹ *Id.*

⁹² AT&T Opposition at 4-5.

⁹³ Application at 7 (citing AT&T Latin America as an example of a U.S. carrier that has entered Argentina's telecommunications markets).

⁹⁴ *Id.*

⁹⁵ *Id.* Applicants' Reply at 8; and Exhibit D. The Applicants provide projected data for 2002 showing that the number of mobile subscribers (10,500,000) will surpass the number of fixed line subscribers (8,500,000).

substitutes, as evidenced by studies of customer choice.⁹⁶ The Applicants have provided no evidence that customers in Argentina consider wireless and wireline services to be close substitutes. Moreover, wireless carriers would be in a position to prevent Telecom Argentina from exercising market power only if they were independently owned. The Applicants have not shown that Telecom Argentina lacks ownership interests in wireless companies providing service in its franchise area.

21. As the second claim, the Applicants argue that there are no significant barriers to entry and expansion due to Argentina's liberal licensing framework.⁹⁷ We do not find this argument persuasive. The Applicants state that the Argentina regulator is independent and that local and long-distance telecommunications markets are open to an unlimited number of licensees, with streamlined licensing procedures, no foreign ownership restrictions, and no build-out requirements.⁹⁸ A country's regulatory regime is, however, only one factor that may impede entry and expansion in the local access market.⁹⁹ There are also important economic factors. Entry into the local access market must be likely, timely, and sufficient in order to constrain an incumbent's market power.¹⁰⁰ Entry into the local access market poses substantial risks and is very costly. It may be difficult for a new entrant to earn a satisfactory return on investment after incurring substantial sunk costs.¹⁰¹ The Applicants have not made a showing that a significant amount of competitive entry into the local access market is likely despite these factors. In particular, the Applicants have not provided evidence that potential entry into Telecom Argentina's local franchise area would be sufficient to constrain the exercise of market power by Telecom Argentina in the provision of local access services within the two-year time-frame contemplated in the DOJ/FTC Merger Guidelines.¹⁰² Nor have the Applicants demonstrated that a significant amount of actual entry has taken place by showing, for example, a diminution of Telecom Argentina's market share in the local access market.

22. As the third claim, the Applicants argue that Telecom Argentina lacks market power due to Argentina's compliance with the Commission's benchmark settlement rates.¹⁰³ We do not find the Applicants' argument persuasive. Compliance with benchmarks limits, but does not eliminate, Telecom Argentina's ability to engage in price discrimination (*e.g.*, a predatory price squeeze).¹⁰⁴ Moreover, compliance with benchmarks does not affect Telecom Argentina's incentive or ability to engage in non-price discrimination, *e.g.*, discrimination in the provisioning or maintenance of basic network facilities

⁹⁶ See, *e.g.*, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum, Opinion and Order, 13 FCC Rcd 20599, paras. 31-33 (1998).

⁹⁷ Application at 4, 7 and 9-10. Applicants' Reply at 9.

⁹⁸ Application at 9-10.

⁹⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23995, para. 230.

¹⁰⁰ See 1992 DOJ/FTC Merger Guidelines at Section 3.

¹⁰¹ *Id.* at Section 3.3. Sunk costs are costs that cannot be recovered when a firm leaves an industry. See MIT Dictionary of Modern Economics, 4th ed., David W. Pearce, ed., MIT Press, Cambridge, Massachusetts, 1997. In the case of entry into the local access market, sunk costs include one-time start-up expenses and large capital outlays for network infrastructure that are unlikely to be recoverable in the event that the firm exits the marketplace.

¹⁰² See 1992 DOJ/FTC Merger Guidelines at Section 3.2.

¹⁰³ Application at 8-9; Applicants' Reply at 8 – 9.

¹⁰⁴ See *Foreign Participation Order*, 12 FCC Rcd at 23976-77, para. 192.

and services needed to terminate traffic with Telecom Argentina.¹⁰⁵

23. Finally, the Applicants claim that they and their indirect parent, Telecom Italia S.p.A., have little or no incentive or ability to influence Telecom Argentina to discriminate in favor of the Applicants because Telecom Italia S.p.A., the Applicants' indirect parent, holds only a small indirect ownership interest (27 percent) in Telecom Argentina.¹⁰⁶ The Applicants' claim, however, does not support their argument that Telecom Argentina lacks sufficient market power on the U.S.-Argentina route to adversely affect competition in the U.S. market. A foreign carrier's market power is based on its control of relevant markets on the foreign end of a U.S. international route, not on its affiliation with a U.S. carrier. As discussed above, a foreign carrier with market power on the foreign end of a U.S. international route can act anti-competitively with respect to the U.S. market even in the absence of a U.S. affiliate, and foreign carriers included on the *Foreign Carrier's List* are presumed to have the ability to do so whether or not they have a U.S. affiliate.¹⁰⁷ The Applicants' claim also fails if we interpret it as an argument for reclassifying the Applicants as non-dominant. As noted above, Telecom Italia S.p.A., the Applicants' parent, has an ownership interest in Telecom Argentina that exceeds 25 percent, which is sufficient under the Commission's rules to cause the Applicants and Telecom Argentina to be classified as affiliates.¹⁰⁸ In the *Foreign Participation Order*, the Commission found that "the greater than 25 percent affiliation standard represents a level of investment that allows a carrier to provide substantial influence with regard to, and to reap substantial rewards from, anti-competitive conduct."¹⁰⁹ The Commission adopted dominant carrier safeguards "to address this heightened incentive and ability of a foreign carrier with market power and its affiliated U.S. carrier to engage in anti-competitive behavior."¹¹⁰ The Applicants have not shown why the 25 percent standard should not apply in the present case.¹¹¹ Moreover, for the purpose of calculating ownership interests cognizable under our affiliation rules, Telecom Italia S.p.A.'s indirect ownership of Telecom Argentina is not approximately 27 percent, as the Applicant's claim, but rather 54.7 percent, substantially above the 25 percent affiliation threshold.¹¹²

24. Based on the economic analysis above, we find that the Applicants have failed to make an adequate showing that Telecom Argentina lacks market power in the local access market in its franchise area or cannot leverage such power into the U.S. market for telecommunications services between the United States and Argentina. We therefore find that the Applicants have failed to show that Telecom

¹⁰⁵ *Id.* at 23993, para. 225, and 24007, para. 259. To protect against non-price discrimination by foreign affiliates, the Commission established quarterly provisioning and maintenance reports for dominant carriers. *Id.* at 24016, para. 277. *See also* 47 C.F.R. § 63.10(c)(3) (2003).

¹⁰⁶ Applicants' Reply at 7.

¹⁰⁷ *See supra* para. 4.

¹⁰⁸ 47 C.F.R. § 63.09(e) (2003). *See supra* para. 5, n.27.

¹⁰⁹ *Foreign Participation Order*, 12 FCC Rcd at 23992, para. 223. *See also Market Entry and Regulation of Foreign – Affiliated Entities*, IB Docket No. 95-22, Report and Order, FCC 95-475, 11 FCC Rcd 3873, 3902-05, paras. 78-85 (1995).

¹¹⁰ *Id.* at 23992, para. 223.

¹¹¹ The Applicants have not shown any special circumstances warranting waiver of the Commission's affiliation or dominant carrier rules. *See* 47 C.F.R. § 1.3 (2003). *See also Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (1990); *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (1969).

¹¹² *See* Note 2 to 47 C.F.R. § 63.09 (2003). According to the Applicants, Telecom Italia S.p.A. holds an indirect 50 percent interest in Nortel Inversora, which in turn holds a 54.7 percent interest in Telecom Argentina. Applicants' Reply at 7. According to Note 2, attribution of ownership interests in a carrier that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of ownership percentages for each link in the vertical ownership chain except that wherever the ownership percentage for any link in the chain is equal to or exceeds 50 percent, it shall be treated as if it were a 100 percent interest.

Argentina lacks sufficient market power on the foreign end of the U.S.-Argentina route to adversely affect competition in the U.S. market, as required by the Commission's rules in lieu of a below-50 percent market share showing.¹¹³

V. CONCLUSION

25. We find that the Applicants have not demonstrated that they should be reclassified as non-dominant carriers on the U.S.-Argentina route or that Telecom Argentina should be removed from the *Foreign Carriers List*. The Applicants have failed to show that Telecom Argentina has less than 50 percent market share in both the international transport and the local access markets on the foreign end of the U.S.-Argentina route or that Telecom Argentina nevertheless lacks sufficient market power on the foreign end of the U.S.-Argentina route to affect competition adversely in the U.S. market, as required by the Commission's rules for purposes of removing Telecom Argentina from the *Foreign Carriers List* and reclassifying the Applicants as non-dominant.¹¹⁴

VI. ORDERING CLAUSES

26. Accordingly, it is ORDERED that the request of Americatel Corporation and Telecom Italia of North America, Inc. to modify their regulatory classification from dominant to non-dominant on the U.S.-Argentina route is DENIED.

27. IT IS FURTHER ORDERED that the request of Americatel Corporation and Telecom Italia of North America, Inc. that Telecom Argentina be removed from the Commission's *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets* IS DENIED.

28. This Order is issued under Section 0.261 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau

¹¹³ 47 C.F.R. § 43.51, Note 3 to § 43.51 and § 63.10(a)(3) (2003).

¹¹⁴ *Id.*